

Petition of Fitchburg Gas and Electric Light Company for approval of its 2002 Electric Reconciliation Mechanism and Transition Charge Reconciliation Filing	) ) ) ) )	D.T.E. 02-84
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\_\_\_\_\_ In its reply brief, Fitchburg Gas and Electric Light Company (“Fitchburg” or the “Company”) seeks to admit into evidence extra-record testimony in the form of an Affidavit of Mark H. Collin (“Affidavit”). The Department of Telecommunications and Energy (“Department”) should strike the Affidavit and all portions of the Company’s Reply Brief that reference the extra-record testimony contained in the Affidavit, pursuant to Mass.R.Civ.P. Rule 12, 220 C.M.R. §§ 1.11(7) and (8), and Department precedent. In support thereof, the Attorney General states:

On April 9, 2003, the Company filed a Motion to Admit Post-Hearing Evidence (“Motion”). In its Motion, the Company sought to substitute the schedules used in calculating the projected G-3 discrepancy with certain Supplemental Schedules. Motion, pp. 1-4. The Company explained in its Motion that it submitted an explanatory sheet and the related Supplemental Schedules in a marked and sealed envelope to the Hearing Officer, pending the Department’s review of the Motion, because it is improper for the Hearing Officer to view the additional evidence before the Motion is granted. Motion, p. 2. On April 16, 2003, the Attorney General filed an opposition (“Opposition”) to the Motion, which is currently pending before the Department. On May 6, 2003, the Company filed its Reply Brief and attached an Affidavit that contains substantially the same extra-record testimony presented under seal with the Motion and related Supplemental Schedules. The Company cites the extra-record testimony in its Reply Brief on page 1, paragraphs two and three and also footnote 1.

The Department's rules provide that "[n]o person may present additional evidence after having rested nor may any hearing be reopened after having been closed, except upon motion and showing of good cause." 220 C.M.R. § 1.11(8). Good cause for purposes of reopening has been defined as a showing that the proponent has previously unknown or undisclosed information regarding a material issue that would be likely to have a significant impact on the decision.

*Blackstone Gas Company*, DTE 01-50 at 14 (2001) citing *Machise v. New England Telephone and Telegraph Company*, D.P.U. 87-AD-12-B at 4-7 (1990); *Boston Gas Company*, D.P.U. 88-67(Phase II) at 7 (1989); *Tennessee Gas Pipeline Company*, D.P.U. 85-207-A at 11-12 (1986). The Department has made clear that, except for updates of routine information already provided on the record, a motion to reopen must be filed and granted before the testimony or exhibits are “thrust upon the trier of fact,” noting that “one cannot un-ring a bell.” *Boston Gas Company*, D.P.U. 88-67(Phase II) at 7 (1989).

Department precedent requires rejection of new arguments and testimony in a party’s briefs. Department precedent establishes that the proper procedure is “strike extra-record evidence from a brief and require the offending party to file a conforming brief without reference to the excluded evidence.” *Boston Edison Company v. Brookline Realty & Inv. Corp.*, 10 Mass.App.Ct. 63, 69 (1980). The Department has also used an alternative approach of “[striking] the offending portions from the brief and [] disregard those portions of the brief in reaching a decision in the case.” *AT&T Communications*, D.P.U. 91-79, p. 8 (1992), citing *Service Publications Inc. v. Gorman*, 396 Mass. 567, 580 (1986); *Hull Municipal Light Plant*, D.P.U. 87-19-A, p. 7 (1990); *Boston Edison Company*, D.P.U. 90-335, pp. 7-9 (1992).

Moreover, state administrative law requires that parties be given an opportunity to cross examine witnesses and present rebuttal evidence. G.L. c. 30A, § 11(3). Department “case law on late-filed exhibits is based upon the premise that late-filed exhibits are prejudicial because other parties do not have the opportunity to conduct cross-examination regarding information contained in late-filed exhibits in order to test the accuracy of the data through the litigation process.” *New England Telephone and Telegraph Company, d/b/a/ NYNEX*, D.P.U. 94-50 at 62 (1995). Hence, only in limited circumstances has the Department found good cause to permit the submission of evidentiary documents into evidence following the close of evidentiary hearings. See *Payphone Inc.*, D.P.U. 90-171, p. 4-5 (1991) (fundamentally unfair to admit evidence not subject to cross examination).

### **III. ARGUMENT**

#### **A. The Company’s Submission of the Affidavit And Reliance on Extra-Record Material On Brief Violates Department Rules and Practice.**

The Department has repeatedly reminded the Company of the procedure parties are suppose to follow, under Department rules and precedent, before thrusting material on the trier of fact after the end of hearings. 220 C.M.R. § 1.11(8); *Boston Gas Company*, D.P.U. 88-67(Phase II) at 7 (1989); *Fitchburg Gas and Electric Light Company*, D.T.E. 02-24/25, p. 12 (2002); *Fitchburg Gas and Electric Light Company*, D.T.E.99-118, p. (2001). After initially following proper procedures in filing the Motion, on reply brief the Company has again submitted post-hearing material without following proper procedures. The extra-record testimony in the Affidavit, relied upon in the Company’s Reply Brief, is substantially the same as that kept sealed with the Motion and Supplemental Schedules. The Company failed to submit a motion with the Affidavit that establishes good cause for admitting the Affidavit into evidence as required by 220 C.M.R. § 1.11(8).

**B. The Department Should Strike the Affidavit and the Relevant Portions of the Company's Reply Brief.**

The Company improperly attempts to use a post-hearing Affidavit to respond to the Opposition.<sup>1</sup> Because the Company has not followed Department rules and precedent, the Department should exclude the Affidavit and related extra-record testimony from evidence and ignore arguments in the reply brief based on those materials. The Attorney General requests that the Department strike the Affidavit; paragraphs 2 and 3 on page 1 of the Reply Brief; and footnote 1 of the Reply Brief since they cite, reference or otherwise rely upon extra-record evidence and testimony. Numerous statements in the Affidavit and the relevant portions of the Reply Brief are not supported by the record. Allowing the Company to cite, reference or otherwise rely upon extra-record evidence and testimony that the Attorney General had no opportunity to cross-examine violates the Attorney General's due process rights and the Department rules and precedent. *See MediaOne/New England Telephone*, D.T.E. 99-42/43, p. 17-18 (1999); *Boston Edison Company*, D.P.U. 90-335, p. 7-8 (1992); *Payphone Inc.*, D.P.U. 90-171, p. 4-5 (1991); *see also* G.L. c. 30A, § 11; and 220 C.M.R. §§ 1.11(4), 1.11(7); and 1.11(8). Accordingly, the Affidavit and the relevant offending portions of the Company's Reply Brief should be stricken from the record. *See Boston Edison Company v. Brookline Realty & Inv. Corp.*, 10 Mass.App.Ct. 63, 69 (1980).

**IV. CONCLUSION**

For these reasons, the Department should exclude the Affidavit and related extra-record testimony from evidence, and should strike the relevant portions of the Company's Reply Brief from the record.

Respectfully submitted,

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<sup>1</sup> By including the Affidavit with the Reply Brief, the Company improperly affords itself additional time and opportunity to respond to the Opposition which is not contemplated by the deadline set by the Hearing Officer for parties to respond to the Motion. Further, the Company improperly uses the Affidavit to attempt to cure a defect that the Attorney General raised in his Opposition regarding unsworn testimony that the Company sought to have admitted.